NOVA SCOTIA COURT OF APPEAL
Citation: *Nelson v. Dorey*, 2020 NSCA 34

Date: 20200327
Docket: CA 497639
Registry: Halifax

Between:

Dennis Nelson and Judith Nelson

Applicants/Intended Appellants

v.

Jason Dorey and Norena Nelson

Respondents

Judge:	Bryson, J.A.
Motion Heard:	March 26, 2020, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Ian Gray, for the applicants Aaron Schwartz, for the respondents

Decision:

Introduction

[1] Dennis Nelson and Judith Nelson apply for leave to extend time to appeal the January 24, 2020 decision of the Honourable Justice Glen McDougall whereby he declared them to be tenants in the property of Jason Dorey and Norena Nelson and ordered that they vacate the premises by March 31, 2020 (2020 NSSC 107).

[2] The Nelsons also apply for a stay of judgment and of the order issued by Justice McDougall. Mr. Nelson has filed two brief affidavits in support of the motions.

[3] For reasons that follow, the application to extend is dismissed. Following a review of the facts, the criteria for an extension and a stay will be addressed.

Factual Background

[4] The following facts largely come from Justice McDougall's decision and are described by him as "in many respects uncontested".

[5] The Nelsons are the parents of Norena Nelson who lived with her parents in a single-family home, rented by the Nelsons, at 15 Avondale Road in Cole Harbour. In 2006, Jason Dorey moved in with Norena Nelson and her parents. Jason Dorey and Norena Nelson were in a relationship and then expecting a child.

[6] In January 2008, Jason Dorey and Norena Nelson purchased 15 Avondale Road. Title was taken in joint tenancy. The purchase price was $197,000.00 which was entirely financed by Jason Dorey and Norena Nelson both through personal savings and a mortgage.

[7] The Nelsons did not contribute financially to the purchase of the home. They had nothing to do with arranging the purchase or financing of the property.

[8] After Jason Dorey and Norena Nelson purchased the property they agreed with the Nelsons that they could continue to live in the home by paying rent of $1,000.00 a month and utilities. On occasion, Dennis Nelson assisted with work and repairs around the property and rental payments were adjusted to reflect these contributions.

[9] After purchasing the home, Jason Dorey and Norena Nelson also paid for major renovations and repairs including plumbing work, flooring, new windows and doors, new kitchen cabinets, furnace repairs, oil tank repairs, hot water tank repairs, landscaping, shed construction, electrical work, and an extension on the home to provide a bedroom for one of their children. Jason Dorey and Norena Nelson borrowed $30,000.00 to finance construction of the extension. Again, the Nelsons had nothing to do with it.

[10] Jason Dorey and Norena Nelson and their children resided together in the property from January 2008 until March 2016 when the home was substantially damaged owing to a fire deliberately set by the Nelsons' son, Owen.

[11] Following the March 2016 fire, in May of 2016 Jason Dorey and Norena Nelson purchased another property in Cole Harbour which they financed through a mortgage. In the meantime, they rebuilt their Avondale Road house. The new Avondale Road house was substantially completed by February 2018. The Nelsons moved in, having agreed to pay rent and utilities, as well as agreeing to certain ground rules, including that Owen would not be allowed to live in the house.

[12] In May 2018, Jason Dorey and Norena Nelson found they were expecting another child and decided that they would need to move into 15 Avondale Road and so informed the Nelsons, asking them to vacate in mid-June. They did not do so.

[13] In September 2018, the Nelsons were provided with a Notice to Quit requiring vacant possession on October 31, 2018. The Nelsons did not leave. Jason Dorey and Norena Nelson obtained an order from a Residential Tenancies Officer requiring vacant possession by March 31, 2019. Again, the Nelsons did not leave, but instead appealed the order to Small Claims Court which set aside the order for vacant possession for reasons that are not apparent.

[14] After Jason Dorey and Norena Nelson gave the Nelsons a Notice to Quit in September 2018, the Nelsons refused to allow Jason Dorey or Norena Nelson to have access to the property, frustrating new home warranty inspection and necessary maintenance work. In breach of their "ground rules" agreement, Owen Nelson has been residing with the Nelsons since June 2019.

[15] The Nelsons have not been gainfully employed since 2008 and Dennis Nelson has gone bankrupt on at least two occasions.

[16] There were a number of pre-application hearings or motions in 2019. For these, Dennis Nelson represented himself and his wife, Judith Nelson, advising the court on occasion that he had consulted counsel. At the hearing before Justice McDougall, Dennis Nelson again represented himself and his wife.

[17] The Nelsons did nothing and said nothing about Justice McDougall's decision and order until they consulted counsel about an appeal on March 9, 2020.

Motion to Extend Time

[18] *Civil Procedure Rule* 90.37(12) allows a judge to extend or abridge any time limits referred to in *Rule* 90. It is common ground that the Nelsons are well out of time to appeal the January 24, 2020 decision of Justice McDougall. Historically, this Court has applied a three-part test when considering whether to extend time for an appeal. In *Bellefontaine v. Schneiderman*, 2006 NSCA 96, the Court described what considerations go into the exercise of discretion to extend time:

> [3] A three‑part test is generally applied by this Court on an application to extend the time for filing a notice of appeal, requiring that the applicant demonstrate (*Jollymore Estate Re* (2001), 196 N.S.R. (2d) 177 (C.A. in Chambers) at para. 22):
>
> > (1) the applicant had a bona fide intention to appeal when the right to appeal existed;
> >
> > (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and
> >
> > (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference.
>
> [4] Where justice requires that the application be granted, the judge may allow an extension even if the three part test is not strictly met (*Tibbetts v. Tibbetts* (1992), 112 N.S.R. (2d) 173 (C.A. in Chambers)).

[19] More recently, the Court has restated the factors typically taken into account when considering whether to extend time:

- The length of delay;
- The reason for the delay;
- The presence or absence of prejudice;

- The apparent strength or merit in the proposed appeal;
- The good faith intention of the applicant to exercise his right of appeal within the prescribed time limit.

(*Farrell v. Casavant*, 2010 NSCA 71 at ¶17; *R. v. F.H.*, 2016 NSCA 70 at ¶11-12).

[20] The second and fifth factors can be conveniently considered together.

[21] These factors are to guide the exercise of the Court's discretion whether to extend. In the end, the ultimate question is whether justice requires that an extension be granted.

The Delay

[22] The Nelsons had 25 days to appeal Justice McDougall's decision, excluding weekends and holidays (*Rule* 90.13 and 94.02). However one looks at it, the Nelsons were out of time when they first attempted to file a Notice of Appeal on March 10, 2020. They did not seek counsel until March 9, 2020. The motion to extend time appeared on March 19, 2020. Although the respondents were not served in time under the *Rules*, owing to the approach of March 31, 2020, I agreed to hear the matter.

[23] In this case, the significance of delay takes its character from the imminence of the events feared and the relief sought. Justice McDougall ordered vacant possession by March 31, 2020. Mr. Nelson says he wanted to appeal as of January 30, 2020. Yet he did nothing to advance his intention until consulting counsel on March 9, 2020. Legally he did nothing until March 19, 2020. Nor did he favour his daughter or her partner with any indication of his intention to appeal. In all the circumstances, the delay is significant. More will be said about this below.

Reason for Delay

[24] This is considered under *bona fide* intention to appeal.

Prejudice

[25] The Nelsons argue that they are at immediate risk of being displaced; a risk created by their own indolence. They fear eviction if they cannot appeal and

obtain a stay. Of course, the latter requires the former. There is no evidence of any effort by the Nelsons to seek alternative accommodation.

[26] On the other hand, Jason Dorey and Norena Nelson have been barred from their property for almost two years, with many months more to go if there is an appeal. The Nelsons have excluded them from the property, yet the respondents carry all the financial and legal risks without any control of the property or those risks. Owen Nelson—who burned down the house before—continues to live there, in breach of the terms of the Nelsons' occupation.

[27] This factor does not favour the Nelsons.

Apparent Strength or Merit of the Proposed Appeal

[28] This is sometimes referred to as the need for the applicant to show an "arguable issue". In *S.E.L. v. Nova Scotia (Community Services)*, 2002 NSCA 62, Justice Cromwell put it this way:

> [15] One relevant consideration is the merits of the proposed appeal. Of course, ***it is not appropriate at this very preliminary stage of a proposed appeal to attempt a searching examination of the merits but, where, as here, the material before the Court permits it, consideration of whether arguable grounds of appeal exist is appropriate.*** An arguable ground of appeal has been defined as a realistic ground, which, if established, appears of sufficient substance to be capable of convincing a panel of the Court to allow the appeal: *Coughlan v. Westminer Canada Ltd.* (1993), 125 N.S.R. (2d) 171 (C.A. Chambers) at 174 - 175.
>
> [Emphasis added]

[29] In *R. v. R. E.M.*, 2011 NSCA 8, Justice Beveridge elaborated on what an applicant must demonstrate:

> [72] ***However, the applicant must be able to identify and set out a ground that is at least arguable. I had the advantage of having the whole of the trial record, written and oral argument before the SCAC and the decision of the SCAC judge. Mr. M. has had every opportunity to file evidence and submissions and make oral argument to address the requirement that his proposed appeal have at least one arguable issue.*** I would not hesitate to grant an extension of time for Mr. M. if he articulated, or I could discern, any arguable issue upon which leave to appeal might be granted by this Court. I could find none, and accordingly his

> Motion to extend time to file an Application for Leave to Appeal and Notice of Appeal is dismissed.
>
> [Emphasis added]

[30] In *S.E.L.*, Justice Cromwell noted the absence of any "evidentiary basis" for a proposed ground of appeal as important to the exercise of discretion. Also see *R. v. White*, 2016 NSCA 20 at ¶21-22.

[31] The only ground of appeal set forth in the proposed Notice submitted by the Nelsons is "The learned trial judge erred in law when he failed to award the appellants an equitable interest in the property at 15 Avondale Road, Cole Harbour, Nova Scotia". He adds a catchall "such other grounds as may become apparent after review of the transcript of the hearing".

[32] The Nelsons allege no specific cause of action with respect to which Justice McDougall erred, and provide no evidentiary support for their proposed ground of appeal.

[33] They add as authorities for the appeal *Murphy v. Colbourne*, 2016 NSSC 211 and *Reid v. Reid*, 2019 NSSC 229, about which cases, more later.

[34] There are many kinds of equitable interest. Equitable interests in property are very broad and can include such things as: a beneficiary's interest in an express trust; the equitable claim to title of a purchaser who has not yet received a deed; the equitable title of someone who has paid for property, title to which is taken in another's name. Nothing like this appears in the Notice of Appeal or in Mr. Nelson's affidavit.

[35] Resort to Justice McDougall's decision does not avail the Nelsons. The proposed ground of appeal is generic and discloses no arguable issue.

[36] It appears that four arguments were made to Justice McDougall. The Nelsons claimed an equitable interest in 15 Avondale Road based on either (a) resulting trust; (b) constructive trust; (c) unjust enrichment; (d) contract.

[37] In general, a resulting trust will arise when one party pays for the acquisition of property and someone else holds the legal title. In such cases, subject to the payor's intent, the title holder is said to hold the property in trust for the true purchaser (for example, *Pecore v. Pecore*, 2007 SCC 17 at ¶20; *Nicholson v. Whyte*, 2005 NSSC 198 at ¶7).

[38] The Nelsons have led no evidence in this application that they contributed to the purchase of 15 Avondale Road. The judge so found on the facts before him.

[39] A constructive trust is a remedy that is imposed by the Court in circumstances where it would be unjust that the legal title holder enjoy—or exclusively enjoy—ownership of the property. A constructive trust may be awarded where a claimant establishes unjust enrichment and a monetary remedy is inadequate (for example *Kerr v. Baranow*, 2011 SCC 10 at ¶46). This brings us to unjust enrichment.

[40] An action for unjust enrichment will lie where a defendant has been enriched by the plaintiff who has been correspondingly deprived and there is an absence of a juristic reason for the enrichment. Typically, the existence of a contract would be a reason why an apparent enrichment was not unjust (*Kerr* at ¶30-45). In this case, there is no evidence of either an enrichment or a corresponding deprivation. Nor did the judge find any unjust enrichment. He was satisfied that the relationship between the parties was one of tenancy. Any payments were made pursuant to a rental agreement that permitted the Nelsons to occupy 15 Avondale Road. The tenancy agreement would be a complete answer to any alleged enrichment. Contract is a typical reason why "enrichments" have a juristic reason (*Kerr*, at ¶41).

[41] The *Reid* and *Murphy* cases are unhelpful to the Nelsons. Both of those cases involved clear representations that the plaintiff would acquire some kind of property interest, on which the plaintiffs relied to their detriment by expending substantial funds to add to or renovate the defendant's property. In both cases, unjust enrichment was proved. In *Murphy*, the plaintiff was actually deeded a life interest. In this case, there is no such evidence before me and none in the decision of Justice McDougall.

[42] Finally, there is no evidence before me supporting a claim in contract and the judge found none, other than a residential tenancy. In any event, a contract creating an interest in land would have to be evidenced in writing, as the *Statute of Frauds* requires. The judge found no such evidence.

[43] Neither the Nelsons' evidence on this motion nor the judge's decision establish an arguable issue that the Nelsons have an equitable interest in 15 Avondale Road.

Bona Fide Intention to Appeal and Reasons for Failing to Appeal Within the Appeal Period

[44] In his affidavit, Mr. Dennis Nelson deposes:

> 8. I was not able to file my Notice of Appeal within the deadline provided in Civil Procedure Rule 90.13 or 91.05 for the following reasons: I was unaware of the filing deadlines, and moved to correct my error as quickly as I was able. I am not a wealthy man, and was only able to raise the money for the filing fees of this motion after several days of effort.

[45] Essentially Mr. Nelson gives two reasons for being late. First, ignorance of the filing deadlines, and second, the inability to raise filing fees to initiate "this motion". Neither is persuasive.

[46] Mr. Nelson deposes that he intended to appeal on January 30, 2020. He offers as an excuse for doing nothing that he did not know of any appeal period, and he lacked the funds to file "this motion". The cost of filing a Notice of Appeal is $218.05 plus law stamp ($25 + HST).

[47] The Nelsons live in a rented house. They do not work. They obviously have some resources. They have fought various legal processes and consulted counsel on several occasions. Mr. Nelson is not credible when he claims, without explanation, that he lacked two hundred odd dollars to start an appeal to save his home.

[48] Moreover, the prospect of an appeal would have been apparent to him at the original hearing in December when, to quote the trial judge:

> [40] ... at the hearing on Monday, December 1, 2019, I urged Mr. Nelson not to wait until the date set to deliver my decision to begin the search for alternate accommodations. One should have been able to read into this that the outcome might not be in his and his wife's favour. I did not wish to order them to vacate during the Christmas/New Year period.
>
> [41] An additional two months and one week should be plenty of time for them to find a suitable alternative place to live, as well as, to afford time for their son, Owen, to apply to, once again, amend the terms of his release conditions pending trial.

[49] This was an ominous warning to the Nelsons of their prospects of success. An appeal must have been an obvious alternative, even in December. Even so, if Mr. Nelson had formed an intention to appeal on January 30, 2020, he did nothing

about it, notwithstanding that Justice McDougall required him to vacate his home on March 31, 2020. The proximity of that event should have provoked a prompt response by the Nelsons. But no; they did not seek counsel until the 9th of March, 44 days after the decision and 38 days after the alleged intention to appeal.

[50] As for a plea of ignorance of appeal periods—for a mature individual with experience of bankruptcy and court proceedings, including a successful Small Claims Court appeal, such a claim is not credible. Mr. Nelson would have had to know something about appealing the residential tenancies order requiring him to vacate the property. Apparently he observed filing timelines to appeal to the Small Claims Court and in the application processes before Justice McDougall.

[51] At one time a layperson's plea of ignorance of court procedure would be readily conceded. Today things are different. The age of the internet permits quick access to many resources. In this case, the Nelsons could go to the court's website and with two icon "clicks" discover that appeals generally must be brought within 30 days. There are also icons giving access to a short video on appeals which includes time limits. There is a section on "Representing Yourself in the Court of Appeal" which has links to Frequently Asked Questions, which advises of time limits, and a pamphlet which does the same (a hard copy of which is available at the Law Courts). Finally there is a link to a Free Legal Clinic, allowing a one hour cost-free consultation.

[52] I am sceptical that Mr. Nelson formed a good faith intention to appeal within the appeal period, but even if he did, his explanation for doing nothing thereafter is unconvincing. Consideration of good faith and reasons for delay do not favour an extension of the appeal period.

Conclusion on Extension of Time

[53] Considering all of the relevant factors, and in particular the proposed grounds for appeal, the Nelsons' claims of ignorance and excuses for delay, I am not satisfied that it is in the interest of justice to extend the time to file an appeal in this case. There is no clearly articulated ground of appeal. The Nelsons have delayed at every step; they fought eviction to the Small Claims Court; they opposed the application to Justice McDougall and ignored his counsel about seeking alternative accommodations; they did nothing for almost six weeks once they received the bad news of his decision. On the other hand, Jason Dorey and Norena Nelson have been trying to occupy the home that they built and financed since June 2018—almost two years.

[54] Considering all the factors does not favour granting an extension in this case.

Stay

[55] *Rule* 90.41(2) authorizes granting a stay to "a party to an appeal". A stay is granted in an appeal. Logically that would require that an appeal exist so as to stay a lower court order. As yet, there is no appeal in this case and no order has been granted extending time to do so.

[56] It used to be that in cases of great urgency one could apply for an injunction in the Supreme Court prior to starting an action by filing "In the Matter of an Intended Action" (former *Civil Procedure Rule* 43.01(3)). There does not seem to be an equivalent section in the new *Rules*. Whether such jurisdiction exists in the Court of Appeal is not at all clear. Even so, I would not grant a stay in this case, largely for the reasons already expressed.

[57] Stays are authorized by *Rule* 90.41(2) and require an applicant to establish

1. an arguable issue;
2. irreparable harm if the stay were not granted;
3. that the balance of convenience favours the applicant; and
4. it is otherwise in the interest of justice to grant a stay.

(*Fulton Insurance Agencies Ltd. v. Purdy*, 1990 NSCA 23)

[58] From the foregoing it is clear that (a) there is no arguable issue raised in the proposed Notice of Appeal; (b) there is no apparent irreparable harm. No doubt vacating the property on or before March 31, 2020 will be inconvenient to the Nelsons, but there is no evidence that there are no other houses or suitable accommodation for rent in HRM.

[59] Any present urgency is entirely of the Nelsons own making. Jason Dorey and Norena Nelson have been trying to obtain vacant possession of their property since June 2018. They have provided ample and repeated notice to the Nelsons. As previously indicated, Justice McDougall gave them such a warning at the hearing in December. And finally, the decision itself would have alerted them to the need to find other accommodation or move quickly to try and prevent implementation of the court's order. They have not done the former, and they have only done the latter at the last minute.

[60] Irreparable harm is typically either harm that cannot be quantified in money or damages which the defendant cannot pay (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311; *Maxwell Properties Ltd. v. Mosaik Property Management Ltd.*, 2017 NSCA 76 at ¶53-55). There is no evidence that any potential harm to the Nelsons would be irreparable, or if damages were awarded, the respondents could not pay them.

[61] In both cases on which the Nelsons rely—*Reid* and *Murphy*—the court was able to award damages.

[62] It is only where an applicant has proved irreparable harm that the Court need consider balance of convenience (*American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504; *Maxwell Properties* at ¶61). This requires balancing which party would suffer the greater irreparable harm depending on whether the stay was granted or withheld. In this case there is no evidence of irreparable harm to either party and the balance of convenience would not normally need to be considered. In cases where the balance is even, the apparent merits may prevail (*American Cyanamid* at p. 511). The merits favour the respondents.

[63] The dilatory litigant is frequently denied equitable relief, either because there is no urgency or because their delay has created that urgency. So it is here.

[64] Mr. Nelson talks about Covid-19 having a possible impact on his ability to find alternative accommodation. That would be a very recent concern, arising in the last two or three weeks. It cannot excuse a failure to do nothing prior to that. But more importantly, Mr. Nelson gives no evidence about having tried to obtain other accommodation and no evidence that the present pandemic will prevent him from renting a suitable apartment or single-family dwelling to replace the one he occupies.

[65] If I had jurisdiction to entertain a stay I would not grant it.

Conclusion

[66] The motion to extend time to file a Notice of Appeal is dismissed with costs of $1,000.00 in favour of Jason Dorey and Norena Nelson.

Bryson, J.A.